



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2022-0145; FRL-9844-02-R4]

Air Plan Approval; Alabama; NO_x SIP Call

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a State Implementation Plan (SIP) revision submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), in a letter dated October 18, 2021. The revision includes corrections to deficiencies to Alabama's regulation titled "NO_x Budget Program Monitoring and Reporting" (AL NO_x SIP Call Monitoring Rule), which EPA previously conditionally approved into the SIP. Specifically, the AL NO_x SIP Call Monitoring Rule establishes monitoring and reporting requirements for units subject to the nitrogen oxides (NO_x) SIP Call, including alternative monitoring options for certain sources of NO_x. EPA is also taking final action to convert the conditional approval to a full approval. In addition, EPA is approving other minor changes into the SIP.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information may not be publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Regulatory Management

Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Steven Scofield, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9034. Mr. Scofield can also be reached via electronic mail at scofield.steve@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Under Clean Air Act (CAA or Act) section 110(a)(2)(D)(i)(I), also called the good neighbor provision, states are required to address the interstate transport of air pollution. Specifically, the good neighbor provision requires that each state's implementation plan contain adequate provisions to prohibit air pollutant emissions from within the state that will significantly contribute to nonattainment of the national ambient air quality standards (NAAQS), or that will interfere with maintenance of the NAAQS, in any other state.

On October 27, 1998 (63 FR 57356), EPA finalized the "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone" (NOx SIP Call). The NOx SIP Call required eastern states, including Alabama, to submit SIPs that prohibit excessive emissions of ozone season NOx by implementing statewide emissions budgets.¹ The NOx SIP Call

¹ See 63 FR 57356 (October 27, 1998).

addressed the good neighbor provision for the 1979 ozone NAAQS and was designed to mitigate the impact of transported NO_x emissions, one of the precursors of ozone.² EPA developed the NO_x Budget Trading Program, an allowance trading program that states could adopt to meet their obligations under the NO_x SIP Call. This trading program allowed the following sources to participate in a regional cap and trade program: generally, electricity generating units (EGUs) with capacity greater than 25 megawatts (MW); and large industrial non-EGUs, such as boilers and combustion turbines, with a rated heat input greater than 250 million British thermal units per hour (MMBtu/hr). The NO_x SIP Call also identified potential reductions from cement kilns and stationary internal combustion engines.

To comply with the NO_x SIP Call requirements, in 2001, ADEM submitted a revision to add new rule sections to the SIP-approved version of Alabama Administrative Code Chapter 335-3-1, General Provisions, and Chapter 335-3-8, Control of Nitrogen Oxides Emissions. EPA approved the revision as compliant with Phase I of the NO_x SIP Call in 2001. *See* 66 FR 36919 (July 16, 2001). The approved revision required EGUs and large non-EGUs in the State to participate in the NO_x Budget Trading Program beginning in 2004. In 2005, Alabama submitted, and EPA approved, a SIP revision to address additional emissions reductions required for the NO_x SIP Call under Phase II. *See* 70 FR 76694 (December 28, 2005).

In 2005, EPA published the Clean Air Interstate Rule (CAIR), which required several eastern states, including Alabama, to submit SIPs that prohibited emissions consistent with revised ozone season NO_x budgets (as well as annual budgets for NO_x and sulfur dioxide). *See* 70 FR 25162 (May 12, 2005); *see also* 71 FR 25328 (April 28, 2006). CAIR addressed the good neighbor provision for the 1997 ozone NAAQS and 1997 fine particulate matter (PM_{2.5}) NAAQS and was designed to mitigate the impact of transported NO_x emissions with respect to ozone and PM_{2.5}. CAIR established several trading programs that EPA implemented through Federal

² As originally promulgated, the NO_x SIP Call also addressed good neighbor obligations under the 1997 8-hour ozone NAAQS, but EPA subsequently stayed and later rescinded the rule's provisions with respect to that standard. *See* 65 FR 56245 (September 18, 2000); 84 FR 8422 (March 8, 2019).

implementation plans (FIPs) for EGUs greater than 25 MW in each affected state, but not large non-EGUs; states could submit SIPs to replace the FIPs that achieved the required emission reductions from EGUs and/or other types of sources.³ When the CAIR trading program for ozone season NO_x was implemented beginning in 2009, EPA discontinued administration of the NO_x Budget Trading Program; however, the requirements of the NO_x SIP Call continued to apply.

On October 1, 2007 (72 FR 55659), EPA approved revisions to Alabama's SIP that incorporated requirements for CAIR. Consistent with CAIR's requirements, EPA approved a SIP revision in which Alabama regulations: (1) sunset its NO_x Budget Trading Program requirements, and (2) incorporated CAIR annual and ozone season NO_x state trading programs. *See* 72 FR 55659. Participation of EGUs in the CAIR ozone season NO_x trading program addressed the State's obligation under the NO_x SIP Call for those units, and Alabama also chose to require non-EGUs subject to the NO_x SIP Call to participate in the same CAIR trading program. In this manner, Alabama's CAIR rules incorporated into the SIP addressed the State's obligations under the NO_x SIP Call with respect to both EGUs and non-EGUs.

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR in 2008, but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR. *See North Carolina v. EPA*, 531 F.3d 896, *modified on rehearing*, 550 F.3d 1176 (D.C. Cir. 2008). The ruling allowed CAIR to remain in effect temporarily until a replacement rule consistent with the court's opinion was developed. While EPA worked on developing a replacement rule, the CAIR program continued to be implemented with the NO_x annual and ozone season trading programs beginning in 2009 and the SO₂ annual trading program beginning in 2010.

Following the D.C. Circuit's remand of CAIR, EPA promulgated the Cross-State Air

³ CAIR had separate trading programs for annual sulfur dioxide (SO₂) emissions, seasonal NO_x emissions, and annual NO_x emissions.

Pollution Rule (CSAPR) to replace CAIR and address good neighbor obligations for the 1997 ozone NAAQS, the 1997 PM_{2.5} NAAQS, and the 2006 PM_{2.5} NAAQS. *See* 76 FR 48208 (August 8, 2011). Through FIPs, CSAPR required EGUs in eastern states, including Alabama, to meet annual and ozone season NO_x emission budgets and annual SO₂ emission budgets implemented through new trading programs. Implementation of CSAPR began on January 1, 2015.⁴ CSAPR also contained provisions that would sunset CAIR-related obligations on a schedule coordinated with the implementation of the CSAPR compliance requirements. Participation by a state's EGUs in the CSAPR trading program for ozone season NO_x generally addressed the state's obligation under the NO_x SIP Call for EGUs. CSAPR did not initially contain provisions allowing states to incorporate large non-EGUs into that trading program to meet the requirements of the NO_x SIP Call for non-EGUs. EPA also stopped administering CAIR trading programs with respect to emissions occurring after December 31, 2014.⁵

To comply with CSAPR, Alabama adopted SO₂ and NO_x CSAPR trading program rules, including budgets, in ADEM Administrative Code Chapters 335-3-5 and 335-3-8. On August 31, 2016, EPA approved Alabama's CSAPR annual SO₂ and annual NO_x trading program rules into the SIP.⁶ *See* 81 FR 59869. Because EPA stopped administering the CAIR trading programs after 2014, the approved CAIR rules in Alabama's SIP have not been implemented for several years. Furthermore, ADEM repealed all CAIR and CAIR-related regulations from Alabama Administrative Code Chapters 335-3-1, 335-3-5, and 335-3-8 on December 9, 2011.⁷ Even though the CAIR programs were not being implemented in Alabama, ozone season NO_x emissions have remained well below the NO_x SIP Call budget levels.

After litigation that reached the Supreme Court, the D.C. Circuit generally upheld

⁴ *See* 79 FR 71663 (December 3, 2014).

⁵ *See* 79 FR 71663 (December 3, 2014) and 81 FR 13275 (March 14, 2016).

⁶ In the 2016 action, EPA did not act on the portion of Alabama's SIP submittal intended to replace Alabama units' obligations to participate in CSAPR's Federal trading program for ozone-season NO_x emissions.

⁷ Although CAIR-related regulations were repealed from ADEM Administrative Code on December 11, 2011, the repeal of the regulations was not effective until February 20, 2015. EPA removed the repealed regulations from the SIP, effective August 6, 2021. *See* 86 FR 35610 (July 7, 2021).

CSAPR but remanded several state budgets to EPA for reconsideration. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 129-30 (D.C. Cir. 2015). EPA addressed the remanded ozone season NO_x budgets in the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (CSAPR Update), which also partially addressed eastern states' good neighbor obligations for the 2008 ozone NAAQS. *See* 81 FR 74504 (October 26, 2016). The air quality modeling for the CSAPR Update demonstrated that Alabama contributes significantly to nonattainment and/or interferes with maintenance of the 2008 ozone NAAQS in other states. The CSAPR Update reestablished an option for most states to meet their ongoing obligations for non-EGUs under the NO_x SIP Call by including the units in the CSAPR Update trading program.

The CSAPR Update trading program replaced the original CSAPR trading program for ozone season NO_x for most covered states. On October 6, 2017, EPA approved Alabama's CSAPR Update ozone season NO_x trading program rules for EGUs into Alabama's SIP.⁸ *See* 82 FR 46674.⁹ Alabama's EGUs participate in the CSAPR Update trading program, generally also addressing the state's obligations under the NO_x SIP Call for EGUs. However, Alabama elected not to include its large non-EGUs in the CSAPR Update ozone season trading program. Because Alabama's large non-EGUs no longer participate in any CSAPR or CSAPR Update trading program for ozone season NO_x emissions, the NO_x SIP Call regulations at 40 CFR 51.121(r)(2), as well as anti-backsliding provisions at 40 CFR 51.905(f) and 40 CFR 51.1105(e), require these non-EGUs to maintain compliance with NO_x SIP Call requirements in some other way.

Under 40 CFR 51.121(f)(2) of the NO_x SIP Call regulations, where a state's

⁸ This action approved CSAPR and CSAPR Update-related provisions of Alabama SIP submissions dated October 26, 2015, and May 19, 2017.

⁹ In subsequent litigation, the D.C. Circuit upheld the CSAPR Update in virtually all respects but remanded it because it was partial in nature and did not fully eliminate upwind states' significant contribution to nonattainment or interference with maintenance of the 2008 ozone NAAQS by "the relevant downwind attainment deadlines" in the CAA. *Wisconsin v. EPA*, 938 F.3d 303, 313-15 (D.C. Cir. 2019). To address the remand, in 2021 EPA issued the Revised CSAPR Update, in which the Agency determined (among other things) that the requirements established for Alabama in the CSAPR Update did in fact constitute a full remedy for the State's good neighbor obligations with respect to the 2008 ozone NAAQS. 86 FR 23054, 23054 (April. 30, 2021).

implementation plan contains control measures for EGUs and large non-EGU boilers and combustion turbines, the SIP must contain enforceable limits on the ozone season NO_x mass emissions from these sources. In addition, under 40 CFR 51.121(i)(4) of the NO_x SIP Call regulations as originally promulgated, the SIP also had to require these sources to monitor emissions according to the provisions of 40 CFR part 75, which generally entails the use of continuous emission monitoring systems (CEMS). Alabama triggered these requirements by including control measures in its SIP for these types of sources, and the requirements have remained in effect despite the discontinuation of the NO_x Budget Trading Program after the 2008 ozone season.

On March 8, 2019, EPA revised some of the regulations that were originally promulgated in 1998 to implement the NO_x SIP Call.¹⁰ The revision gave states covered by the NO_x SIP Call greater flexibility concerning the form of the NO_x emissions monitoring requirements that the states must include in their SIPs for certain emissions sources. The revision amended 40 CFR 51.121(i)(4) to make part 75 monitoring, recordkeeping, and reporting optional, such that SIPs may establish alternative monitoring requirements for NO_x SIP Call budget units that meet the general requirements of 40 CFR 51.121(f)(1) and (i)(1). Under the updated provision, a state's implementation plan still needs to include some form of emissions monitoring requirements for these types of sources, consistent with the NO_x SIP Call's general enforceability and monitoring requirements at 40 CFR 51.121(f)(1) and (i)(1), respectively, but states are no longer required to satisfy these general NO_x SIP Call requirements specifically through the adoption of 40 CFR part 75 monitoring requirements.

Through a letter to EPA, dated February 27, 2020, ADEM provided a SIP revision to incorporate changes to Alabama's Administrative Code, Chapter 335-3-8, to include Rule 335-3-8-.71, *NO_x Budget Program*, and Rule 335-3-8-.72, *NO_x Budget Program Monitoring and*

¹⁰ See "Emissions Monitoring Provisions in State Implementation Plans Required Under the NO_x SIP Call," 84 FR 8422 (March 8, 2019).

Reporting, to maintain the State’s compliance with the Federal NO_x SIP Call regulations at 40 CFR 51.121 and 51.122, and to provide alternative monitoring options for certain large non-EGUs. Subsequently, on September 15, 2020, ADEM sent a letter requesting that EPA conditionally approve Rule 335-3-8-.72 and committing to provide a SIP revision to EPA by July 7, 2022, to address a deficiency related to misplacement of stack testing requirements within Rule 335-3-8-.72(1).¹¹ Based on the State’s commitment to submit a SIP revision addressing the identified deficiency, EPA conditionally approved the February 27, 2020, submission on July 7, 2021. *See* 86 FR 35610.¹²

In accordance with EPA’s conditional approval and ADEM’s commitment, the State submitted a SIP revision on October 18, 2021.¹³ The submission corrects the deficiency in Rule 335-3-8-.72(1) and requests EPA to convert the previous conditional approval into a full approval. As proposed through a notice of proposed rulemaking (NPRM) published on May 16, 2022, EPA is approving the October 18, 2021, revision to the Alabama SIP and converting the conditional approval to a full approval of ADEM’s Rule 335-3-8-.72. For a comprehensive discussion of EPA’s analysis and rationale for approving the State’s submittal, please refer to EPA’s May 16, 2022, NPRM. *See* 87 FR 29707 (May 16, 2022). Comments on the May 16, 2022, NPRM were due on or before June 15, 2022. EPA received one comment on that proposal, and it supports EPA’s proposed action.

II. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, and as discussed in Section I of this preamble, EPA is finalizing the incorporation by reference of Alabama’s Administrative

¹¹ These stack testing requirements were mistakenly added to 335-3-8-.72(1)(c), which allows sources to fulfill NO_x SIP call monitoring requirements by operating a NO_x CEMS outside of part 75 requirements, instead of 335-3-8-.72(1)(d), which uses emissions factors.

¹² In the same action, EPA approved removal of the CAIR trading program, removal of the NO_x Budget Trading Program rules, and the State’s renumbering of the existing regulation titled “New Combustion Sources” from Rule 335-3-8-.14 to Rule 335-3-8-.05.

¹³ EPA notes that the submission was received by the Regional Office on October 20, 2021. However, for clarity, this document refers to the letter date of October 18, 2021.

Code Rule 335-3-8-.72, *NOx Budget Program Monitoring and Reporting*, which establishes emission monitoring requirements for units subject to the NOx SIP call, state effective December 13, 2021. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, the revised materials as stated above, have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.¹⁴

III. Final Action

EPA is taking final action to approve Alabama's October 18, 2021, submission, which revises Alabama Rule 335-3-8-.72, *NOx Budget Program Monitoring and Reporting*, to correct the stack testing requirement by moving it from 335-3-8-.72(1)(c) to 335-3-8-.72(1)(d) and correct language in 335-3-8-.72(d) to refer to NOx mass emissions. In addition, EPA is taking final action to convert the July 7, 2021, conditional approval of Alabama Rule 335-3-8-.72 to a full approval.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

¹⁴ *See* 62 FR 27968 (May 22, 1997).

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175

(65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: June 30, 2022.

Daniel Blackman,
Regional Administrator,
Region 4.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart B – Alabama

§ 52.49 [Removed and Reserved]

2. Remove and reserve § 52.49.

3. In § 52.50(c), amend the table by revising the entry for “Section 335-3-8-.72” to read as follows:

§52.50 Identification of plan.

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(c) * * *

EPA-Approved Alabama Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
**	**	*	*	*
Section 335–3–8–.72	NOx Budget Program Monitoring and Reporting	12/13/2021	[Insert date of publication in FEDERAL REGISTER], [Insert citation of publication]	
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